



## BIDSYNC CONTRACT

*(Effective Date: June 2, 2015)*

**THIS** Software Services Order (“**Order**” or “**Agreement**”) is made and entered into on the effective data above (“**Effective Date**”) by and between **RFP Depot LLC., dba BidSync**, a Utah corporation whose address is 629 East Quality Drive, Suite 101, American Fork, UT 84003, hereinafter referred to as "**BidSync**", and City of Manhattan Beach, whose address is 3621 Bell Avenue, Manhattan Beach, CA 90266, hereinafter referred to as "**Customer**", to be effective upon execution of this Agreement by Customer’s duly authorized designee, both individually, as “**party**” and, collectively, as “**parties**” depending on the context in which the term is used. The terms and conditions of the Agreement include this Order form, the Terms & Conditions attached hereto, and any Exhibits attached thereto, all of which are incorporated herein by reference. In the event of a conflict between this Order, the Terms & Conditions, and any Exhibits, documents shall control in the following order of priority: 1) this Order 2) the Terms & Conditions and 3) the Exhibits.

**WHEREAS**, Customer wishes to procure a secure, automated, online competitive procurement system that allows Customer’s Purchasing Office (the “**Purchasing Office**”), the department responsible for purchasing goods and services on behalf of Customer, to manage all competitive and other procurement processes performed by the Purchasing Office; and

**WHEREAS**, BidSync offers an online competitive procurement system, and associated services and wishes to provide that system and associated services to Customer under the terms and conditions set forth herein.

### SECTION 1 STRUCTURE OF AGREEMENT

**1.1 Structure of Agreement.** This Agreement is entered into (the “**Terms & Conditions**” or “**Agreement**”) consist of the terms and conditions contained herein, **Exhibit A - Scope of Available Product, Services and Support** and **Exhibit B – Order Form** attached hereto as entered into and executed by both parties hereunder. Any reference to this Agreement shall be a reference to these Terms & Conditions, as well as any additional terms, conditions or descriptions contained within and any executed Order, which will govern each party’s rights and obligations relating to BidSync’s provision of the Software Services hereunder.

**1.2 Orders.** BidSync shall furnish to Customer and Customer will accept and pay for the Software Services as indicated on a written order that has been executed by an authorized officer of Customer and accepted in writing by BidSync (“**Order(s)**”). The Order form shall incorporate by reference the terms and conditions set forth herein. The Order shall reflect the Software Services purchased and procured by Customer, in the quantities and prices set forth therein. Following the Effective Date of this Agreement, Customer may place orders for the Software Services with BidSync, as indicated on the initial Order or subsequent Orders. The receipt or deposit by BidSync of Customer’s down payment will not constitute acceptance of the related Order. BidSync will return any down payment in the event that it does not accept the Order. BidSync’s method of acceptance of Orders for the Software Services submitted under this Agreement will be the acceptance in writing of a properly executed Order listing the Software Services for which Customer has committed to purchase.

### SECTION 2 DEFINITIONS

**2.1 “Additional Services”** shall have the meaning provided in Section 3.9 herein.

**2.2 “Affiliate(s)”** of a party shall mean any corporation or other entity which controls, is controlled by, or is

under common control with such party, wherever located in the world. A corporation or other entity shall be deemed to control another corporation or entity if it owns, directly or indirectly, more than fifty percent (50%) of the voting shares or other interest in such other corporation or entity, or has the power to elect more than half the directors of such other corporation or entity.

**2.3** “**Authorized Users**” means individuals as specified in the relevant Order who are authorized to access the Software Services described in the Order.

**2.4** “**Confidential Information**” shall have the meaning provided in Section 9 herein.

**2.5** “**Customer Data**” means all data, information, content or material that Customer enters into the Software Services or has entered on its behalf.

**2.6** “**Disclosing Party**” shall have the meaning provided in Section 9 herein.

**2.7** “**Disputing Party**” shall have the meaning provided in Section 3.13 herein.

**2.8** “**Documentation**” means sufficient written explanations of the intended functionality of the Software Services and other written material generally intended to guide the user in the configuration and use of the Software Services, including, but without limitation, user guides, training materials, worksheets, workbooks, implementation and reference materials, and other documentation, whether in printed or electronic form.

**2.9** “**Effective Date**” means the date so indicated on the applicable Order(s).

**2.10** “**Export Laws**” shall have the meaning provided in Section 10.14 herein.

**2.11** “**Governmental Entity**” means a state agency or a political subdivision of a state, or a federal agency or a political subdivision of the federal government.

**2.12** “**Initial Term**” means the initial subscription period identified in the Section 4.1, during which BidSync must provide, and Customer must pay for the Software Services.

**2.13** “**Intellectual Property**” or “**Intellectual Property Rights**” means intellectual property rights, including without limitation, all works of authorship, mask works, trademarks and service marks (together with any registrations or applications thereof), patents (together with any extensions, reexaminations and reissues of such patents, patents of addition, patent applications, divisions, continuations, continuations-in-part, and all subsequent filings in any country or jurisdiction claiming priority therefrom), copyrights, derivative works, trade secrets, trade dress, know-how, drawings, ideas, designs, concepts, techniques, methodologies, processes, inventions, research and development, and discoveries; including, but without limitation, any and all modifications, updates, derivatives, or variations thereof.

**2.14** “**Order(s)**” shall have the meaning provided in Section 1.2 herein.

**2.15** “**Recipient**” shall have the meaning provided in Section 9 herein.

**2.16** “**Renewal Term**” shall have the meaning provided in Section 4.1 herein.

**2.17** “**SLA**” shall have the meaning provided in Section 3.3 herein.

**2.18** “**Software Services**” means an information technology solution offering described in Section 3 and the **Exhibit A**, whereby software application programs, databases and utilities are hosted and maintained by BidSync on servers (the “**Site**”) that are made accessible to Customer via the Internet. Additional technical information concerning the Site is provided on **Exhibit A**.

**2.19** “**Term**” has the meaning defined in Section 4.1 herein.

**2.20** “**Users**” means your employees, representatives, consultants, contractors, or agents who are authorized to

use the Software Services and have been supplied a user name and password by Customer or by BidSync at Customer's request. All Users with records in "active" status are Users under this Agreement.

**2.20 "Work Product"** shall have the meaning provided in Section 3.9 herein.

### **SECTION 3 SCOPE OF SOFTWARE SERVICES**

**3.1 Scope of Software Services.** Subject to the terms and conditions of this Agreement, BidSync shall provide Customer (only for the number of Users for whom Customer has paid for a subscription) with web-based electronic services and recordkeeping through an automated system that manages Customer's competitive and other procurement processes performed by the Purchasing Office (the "**Software Services**"). The Software Services, and all associated services provided therewith, shall be provided in accordance with the *Scope of Software Services* attached hereto and incorporated herein for all purposes as **Exhibit A**, the Documentation, and the Order(s).

**3.1(a) Additional Users.** User subscriptions are for designated Users and cannot be shared or used by more than one User but may be reassigned to new Users replacing former Users who no longer require ongoing use of the Software Services. Additional Users subscriptions must be added in minimum increments of ten (10), and the term of the additional User subscriptions shall be coterminous with the expiration of the subscription term in effect at the time the Additional Users are added.

**3.1 (b) Government Users.** As defined in FAR section 2.101, DFAR section 252.227-7014(a)(1) and DFAR section 252.227-7014(a)(5) or otherwise, all Software and accompanying documentation provided by BidSync are "commercial items," "commercial computer software" and/or "commercial computer software documentation." Consistent with DFAR section 227.7202 and FAR section 12.212, any use, modification, reproduction, release, performance, display, disclosure or distribution thereof by or for the U.S. Government shall be governed solely by these terms and shall be prohibited except to the extent expressly permitted by these terms.

**3.2 Bid Process.** All of Customer's bid terms, conditions, and disclaimers submitted through the Software Services shall be produced and controlled by Customer. Customer's requests for quotation submitted through the Software Services may only include text descriptions, graphics, pictures and other content relevant to the purchase of that item. Customer is solely responsible for the accuracy of the content and information it provides to BidSync or other users on BidSync's website or in connection with the registration, request for quotes or proposals, bidding, or sale process. BidSync acts as a passive conduit for the online distribution and publication of Customer's information. Customer agrees that, to the best of its ability, Customer's information will not be false, inaccurate or misleading. Customer will comply with all applicable domestic and international laws, statutes, ordinances and regulations regarding its use of the Software Services.

**3.3 Delivery.** BidSync agrees to provide the Software Services to Customer on a subscription fee basis, together with bug fixes, updates or other minor enhancements or improvements thereto, and make the Software Services available in accordance with the service descriptions and availability expressed in **Exhibit A** ("**SLA**"). Customer acknowledges that the Software Services may be temporarily unavailable for scheduled maintenance, for unscheduled emergency maintenance, or because of other causes beyond BidSync's reasonable control (including without limitation delays or other problems inherent in the use of the Internet and electronic communications services), and agrees that BidSync will not be liable to Customer as a result of these temporary service interruptions, except as otherwise expressly provided in the SLA.

**3.4 Upgrades; Additional Modules.** Upgrades to the Software Services (i.e. modifications, additions or substitutions that result in a substantial change, improvement or addition to the Software Services), if available, may be offered by BidSync at an additional charge. Customer may procure additional modules of the Software Services or Additional Services on a coterminous basis by signing an Order detailing such additional modules or Additional Services ordered. The addition of modules to the Software Services may have the effect of increasing Customer's fees paid hereunder for such services for the remainder of the Term.

**3.5 Software Services Support.** BidSync shall provide Customer telephone and web support for the Software Services during the specified periods for such support and under the terms expressed in **Exhibit A** and on the applicable Order.

**3.6 Software Services License.** BidSync hereby grants to Customer, subject to all the terms and conditions of

this Agreement, a non-exclusive, non-transferable (except as permitted in the Agreement), non-sub licensable license to access the Software Services and the Site via the Internet for the duration of the Term, and to use the Software Services, solely for Customer's internal business purposes and for the purposes contemplated in the applicable Documentation and Exhibits, in return for Customer's payment to BidSync of the applicable license fees as expressed in the Order.

**3.7 License Restrictions.** Customer shall not, directly or indirectly, (i) reverse engineer, decompile, disassemble or otherwise attempt to discover the object code, source code or underlying ideas, methodologies, or algorithms of the Software Services; (ii) modify, translate, or create derivative works based on or related to the Software Services; (iii) rent, lease, distribute, sell, resell, assign, or otherwise transfer the rights to the Software Services; (iv) use the Software Services for timesharing or service bureau purposes or otherwise for the benefit of a third party; (v) remove any proprietary notices from the Software Services; (vi) publish or disclose to third parties any evaluation of the Software Services without BidSync's prior written consent; (vii) create any link to the Software Services or frame or mirror the content contained on, or accessible from, the Software Services; or (viii) access the Software Services for purposes of monitoring its availability, performance or functionality, or for any other benchmarking or competitive purposes. Customer may not access the Software Services if you are a direct competitor of BidSync or any of its products and services, except if you disclose such to BidSync and thereafter obtain BidSync's prior written permission.

Customer shall not: (i) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (ii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortuous material, including material harmful to children or material that violates third party privacy rights; (iii) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (iv) modify, interfere with or disrupt the integrity or performance of the Software Services (including the data contained therein); or (v) attempt to gain or permit unauthorized access to the Software Services or its related systems or networks.

The Software Services offer integration capabilities via an application programming interface, or API. The average number of API calls made by Customers is less than 10,000 calls per day. The number of API calls Customer can make is limited to the aggregate maximum of 50,000 calls per day. BidSync or its partners may limit and/or modify Customer's API access from time to time.

**3.8 Proprietary Rights of BidSync.** This is not a work made-for-hire agreement (as that term is defined in Section 101 of Title 17 of the United States Code) with regard to either party. Except for express licenses granted in this Agreement, neither party is granting nor assigning to the other party any right, title, or interest, express or implied, in or to the party's Intellectual Property. Each party reserves all rights in such property. Customer acknowledges that the Software Services and all content contained therein, including, but not limited to, text, software, Intellectual Property Rights, music, sound, photographs, video, graphics and third party materials and advertisements, excluding any Customer Data, (collectively "**Content**"), and all Documentation, is proprietary to BidSync or such third parties, and BidSync or such third parties retain exclusive ownership of the same throughout the world, including all related copyrights, trademarks, service marks, patents, trade secrets or other proprietary rights thereto. Except as expressly stated herein, this Agreement does not transfer, grant, or assign any right, title or interest in the Software Services, Content or Documentation to the Customer.

**3.9 Custom Software Development.** Notwithstanding Section 3.8 above, Customer may procure from BidSync any custom software development services or other services ("**Additional Services**") for the fees defined in the **Exhibit A** and the Order. BidSync shall retain and possess all right, title, interest, and ownership in and to any and all ideas, concepts, know-how, residuals, data processing techniques, software, documentation, processes, data, information, or Intellectual Property developed, used, or acquired by BidSync personnel (alone or jointly with Customer) in connection with the Additional Services provided to Customer ("**Work Product**"), and such Work Product will be the exclusive property of BidSync, and Customer shall have no right, title, interest, or ownership in or to such Work Product, except as expressly provided herein this Agreement, **Exhibit A** or the Order. No customized software development shall be deemed a work made for hire agreement or arrangement unless expressly agreed to by the parties in writing. BidSync shall license to Customer the Work Product of such Additional Services under the same terms as the Software Services license expressed in Sections 3.6, 3.7, and 3.8 and with the same applicable warranties, indemnities, and restrictions as expressed in this Agreement for the Software Services, unless expressly stated otherwise in the Order. EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, BIDSYNC

WARRANTS THAT THE ADDITIONAL SERVICES WILL BE PERFORMED IN A WORKMANLIKE MANNER AND WITH PROFESSIONAL DILIGENCE AND SKILL, IN ACCORDANCE WITH THIS AGREEMENT, THE APPLICABLE ORDER, AND THE EXHIBIT. IF THERE IS A MATERIAL BREACH OF THE ABOVE WARRANTY, BIDSINC'S ENTIRE LIABILITY AND CUSTOMER'S ENTIRE REMEDY SHALL BE, AT BIDSINC'S OPTION TO (I) MODIFY THE ADDITIONAL SERVICES TO CONFORM TO THE ORDER; (II) PROVIDE A REASONABLE WORKAROUND SOLUTION WHICH WILL REASONABLY MEET CUSTOMER'S REQUIREMENTS OR (III) IF NEITHER OF THE FOREGOING IS COMMERCIALY REASONABLE, TERMINATE THE APPLICABLE ORDER OR THIS AGREEMENT WITH NO FURTHER LIABILITY TO BIDSINC. EXCEPT FOR BIDSINC'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 7, THESE REMEDIES ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES FOR A CLAIM OF BREACH OF WARRANTY UNDER THIS SECTION.

**3.10 Passwords.** BidSync shall issue to Customer, or shall authorize a Customer administrator to issue, a password for each Authorized User to use Customer's account for whom Customer has paid the applicable fee. Customer is responsible for maintaining the confidentiality of all user names and passwords and for ensuring that each user name and password is used only by the Authorized User. Customer is solely responsible for any and all usage of the Software Services or activities on the Site resulting from access to the Software Services or the Site through the use of the user names and passwords. Customer agrees to promptly notify BidSync of any unauthorized use of the Customer's account (including each password of each user accessing the Software Services by means of Customer's account) or any other breach of security known to Customer. BidSync shall have no liability for any loss or damage caused by Customer's failure to comply with these requirements. BidSync will maintain Customer passwords as confidential and not disclose them to third parties.

**3.11 Security.** BidSync will maintain the Software Services and Site at a reputable third party Internet service provider and hosting facility, where the Software Services are subject to commercially reasonable security precautions to prevent unauthorized access to the Software Services and Customer Data. Customer acknowledges that, notwithstanding security precautions, use of or connection to the Internet provides the opportunity for unauthorized third parties to circumvent such precautions and illegally gain access to the Software Services and Customer Data. Accordingly, BidSync cannot and does not represent, warrant, or guarantee the privacy, security, or authenticity of any information so transmitted over or stored in any system connected to the Internet. At all times during the Term, BidSync shall collect, store, use, and maintain Customer Data in compliance with all applicable state and federal laws and regulations relating to the privacy, information security, and consumer protection for such data. In no event shall BidSync implement less than a reasonable level of information security for the confidentiality, integrity, and availability of the Customer Data. BidSync shall promptly report to Customer any actual or suspected compromise of the Customer Data.

**3.12 Rights and Obligations Regarding Customer Data.** Customer grants to BidSync a non-exclusive, worldwide, terminable at-will, and royalty-free license, for the Term of this Agreement, to use Customer Data solely to the extent necessary to enable BidSync to provide the Software Services to Customer under this Agreement. As between BidSync and Customer, Customer shall own all Customer Data. Except as permitted in or reasonably anticipated by this Agreement, BidSync will not edit, delete, or disclose the contents of Customer Data unless authorized by the Customer or unless BidSync is required to do so by law or in the good faith belief that such action is necessary to: (i) conform with applicable laws or comply with legal process served on BidSync; (ii) protect and defend the rights or property of BidSync; or (iii) enforce this Agreement. BidSync may provide user statistical information such as usage or traffic patterns in aggregate form to third parties, but such information will not include personally identifying information. BidSync may access Customer Data to respond to service or technical problems with the Software Services. Customer is solely responsible for the accuracy, quality, integrity, legality, reliability, appropriateness, and copyright of all Customer Data and BidSync assumes no responsibility for the deletion, correction, destruction, loss, or infringement of Customer Data used by or stored in the Software Services. BidSync reserves the right to establish a maximum amount of Customer Data that Customer may store, post, transmit on or through the Software Services. BidSync may back up Customer Data every twenty four (24) hours. BidSync's sole obligation in the event of data loss shall be to use commercially reasonable efforts to recover and restore Customer Data using backup media. Notwithstanding the foregoing, Customer grants to BidSync a non-exclusive, worldwide, irrevocable, perpetual, royalty-free license to use and exploit any vendor list or vendor contact information, whether or not such information is provided in combination with Customer Data, that is provided by Customer or uploaded to the Software Services on behalf of Customer, and such information shall not be deemed Confidential Information.

**3.13 Payments.** Customer shall make payments in the amounts indicated on the applicable Order in consideration for the Software Services purchased or procured from BidSync by Customer. BidSync shall provide Customer with an electronic invoice indicating the amounts due to be paid by Customer to BidSync, and Customer shall pay each invoice within thirty (30) days of receipt of such invoice, unless a bona fide dispute with respect to payment of such invoice or portion thereof has arisen. If there is a bona fide dispute regarding any invoice rendered or amount paid or to be paid, the party disputing such invoice (“**Disputing Party**”) shall notify the other party in writing thereof, and the parties shall use their best efforts to resolve such dispute expeditiously. In no event shall a bona fide dispute waive, cancel, or suspend any party’s obligations under this Agreement. If the Disputing Party notifies the other in writing of a disputed invoice or payment, and there is a good faith basis for such dispute, the time for paying the disputed portion of the invoice shall be extended by a period of time equal to the time between the Disputing Party’s receipt of such notice and the resolution of such dispute.

**3.14 Taxes and Interest.** Customer shall be responsible for any taxes applicable to the use of the Software Services, BidSync’s provision of Software Services, or as otherwise applicable to Customer in this Agreement. Such amounts shall be payable by Customer within thirty (30) days of receipt of an itemized invoice from BidSync. In no event shall Customer be responsible for any taxes based on the net income or gross receipts of BidSync. Any other amounts which may become payable by Customer pursuant to this Agreement, shall be payable by Customer within thirty (30) days of receipt of an itemized invoice from BidSync. Undisputed portions of any invoice shall be paid as stated above. Customer acknowledges and agrees that BidSync may impose, and Customer shall pay, a late payment charge on the unpaid balance of undisputed overdue invoices equal to the lesser of (a) one and one-half percent (1.5%) per month (eighteen percent (18%) per annum), or (b) the maximum rate allowed by law. Invoices for charges shall be rendered in accordance with the payment schedule set forth in the applicable Order.

**3.15 Excess Data Storage Fees.** The maximum disk storage provided to Customer at no additional charge is fifty (50) GB. The average disk storage used by Customers is less than twenty (20) GB per year. If the amount of disk storage required exceeds 50 GB, Customer will be charged the then-current storage fees. BidSync will use reasonable efforts to notify Customer when Customer reaches approximately 90% of its storage maximum; however, any failure by BidSync to so notify Customer shall not affect Customer’s responsibility for such additional storage charges. BidSync reserves the right to establish or modify its general practices and limits relating to storage of Customer Data.

## SECTION 4 TERM AND TERMINATION

**4.1 Term.** This Agreement will commence on the Effective Date following approval by Customer, and shall continue in full force and effect for the number of years defined on the Order (the “**Initial Term**”), unless sooner terminated as provided herein. This Agreement shall automatically renew upon expiration of the Initial Term for successive one-year terms (each a “**Renewal Term**”) unless or until terminated by either party in writing at least (30) days prior to the end of the then current Term. The “**Term**” of the Agreement shall be the Initial Term plus any additional Renewal Term(s).

**4.2 Customer Termination.** Customer may terminate this Agreement upon BidSync’s material breach of its obligations hereunder by furnishing BidSync with no less than thirty (30) business days’ prior written notice and give BidSync a reasonable opportunity to cure such breach (if curable); provided however that, termination of this Agreement for any reason immediately terminates any license, right, or service provided by BidSync to Customer under this Agreement. Notwithstanding the foregoing, if Customer is a Governmental Entity, Customer may terminate this Agreement at any time if adequate funds to pay BidSync all fees owed hereunder are not appropriated to the Governmental Entity during the Term, unless otherwise authorized by law.

**4.3 BidSync Termination.** BidSync may, at its option, terminate this Agreement or any Order, or suspend or terminate the Software Services immediately upon written notice to Customer if (i) any invoice is not paid when due hereunder or Customer breaches any of its obligations under Sections 3.6, 3.7, or 3.8; (ii) bankruptcy, receivership, insolvency, reorganization, or similar proceedings are commenced by or against Customer and are not dismissed within thirty (30) days of commencement; (iii) Customer becomes insolvent, makes an assignment for the benefit of creditors, or otherwise admits its inability to pay its debts and obligations as they come due; or (iv) Customer neglects or fails to perform or observe any other term or obligation hereunder and fails to remedy within thirty (30) days after BidSync’s written notice of such failure to Customer.

**4.4 Effect of Termination of the Agreement.** Upon termination of this Agreement, all licenses, rights, and services provided by BidSync to Customer under the Agreement or the applicable Order shall terminate, and Customer shall immediately discontinue use of the Software Services provided under this Agreement or the Order that is being terminated, and BidSync may terminate provision of or access to the Software Services. BidSync shall not be liable to Customer or any third party for suspension or termination of the Software Services in accordance with this Agreement. Any and all provisions, promises and warranties contained herein which by their nature or effect are required or intended to be observed, kept or performed after termination of this Agreement will survive the termination of this Agreement or the applicable Order and remain binding upon and for the benefit of the parties hereto. BidSync shall retain Customer Data for a period of sixty (60) days after expiration or termination of this Agreement. At no additional cost to Customer, BidSync shall provide a one time, mass export of Customer Data in a format to be agreed upon by the Parties. AFTER SAID SIXTY (60) DAYS, ALL CUSTOMER DATA, CONTENT, ACCOUNT INFORMATION, AND SETTINGS INCLUDING, BUT NOT LIMITED TO, CONTENT AND DATA IN PUBLIC AND PRIVATE INFORMATION STORES OR OTHERWISE ON BIDSYNC'S SERVERS OR THE SITE WILL BE IRREVOCABLY DELETED AND DESTROYED.

## **SECTION 5 CUSTOMER OBLIGATIONS**

**5.1 General Obligations.** Customer will use its best efforts to cause its personnel to be, at all times, educated and trained in the proper use and operation of the Software Services and to ensure that the Software Services are used in accordance with applicable manuals, instructions, specifications, and Documentation. Customer shall cooperate with BidSync in BidSync's performance of its obligations under this Agreement, and shall provide access to information and systems as reasonably necessary to assist BidSync in performing its obligations under this Agreement.

**5.2 Hardware and Network Services.** Customer is responsible for obtaining and maintaining all computer hardware, software, communications equipment, and communications network services needed to access the Software Services, and for paying all third-party access or usage charges (e.g. Internet service provider and telecommunications charges) incurred while using the Software Services.

**5.3 Conduct.** Customer agrees: (i) to abide by all local, state, national, and international laws and regulations applicable to Customer's use of the Software Services including, without limitation, all laws regarding the transmission of technical data exported from the United States through the Software Services; (ii) not to upload or distribute in any way files that contain viruses, corrupted files, or any other similar software or programs that may damage the operation of the Software Services or another's computer; (iii) not to use the Software Services for illegal purposes; (iv) not to interfere or disrupt networks connected to the Software Services; (v) not to post, promote or transmit through the Software Services any unlawful, harassing, libelous, abusive, threatening, harmful, vulgar, obscene, hateful, racially, ethnically or otherwise objectionable material of any kind or nature; (vi) not to transmit or post any material that encourages conduct that could constitute a criminal offense or give rise to civil liability; (vii) not to interfere with another customer's use and enjoyment of the Software Services or another entity's use and enjoyment of similar services; and (viii) to comply with all regulations, policies, and procedures of networks connected to the Software Services. Customer acknowledges and agrees that BidSync neither endorses the contents of any Customer communications nor assumes any responsibility for any threatening, libelous, obscene, harassing or offensive material contained therein, any infringement of third party Intellectual Property Rights arising therefrom or any crime facilitated thereby. BidSync may remove any violating content posted on or uploaded to the Software Services or transmitted through the Software Services, without notice to Customer. BidSync acknowledges and agrees Customer has no control over its third party customers/vendors or the content and other information they may submit through the Software Services and that such customers/vendors may not be Customer's agents. As a result, Customer shall have no liability or responsibility with regard to any customer/vendor activity described in clauses (ii) through (vii) that occurs without the knowledge or participation of Customer.

## **SECTION 6**

## WARRANTIES

**6.1 BidSync Warranties.** BidSync represents, warrants, and covenants to Customer that (i) the Software Services, and all associated services provided to Customer by BidSync, BidSync's subcontractors, and agents under this Agreement shall be tested and free of material defects in accordance with industry standards and produced and performed in a skillful and workmanlike manner and shall comply with the Documentation; (ii) BidSync has reviewed all Agreement documents, and has used its best efforts to make all investigations necessary to be thoroughly informed regarding requirements for delivery of products, equipment and/or services as required by the conditions of this Agreement; (iii) BidSync (a) is a duly qualified, capable, and otherwise bondable business entity, (b) is not in receivership or contemplating same, (c) has not filed for bankruptcy, and (d) is not currently delinquent with respect to payment of property taxes in Utah County or the State of Utah; and (iv) all applicable copyrights, patents, trade secrets, licenses and other proprietary and Intellectual Property Rights that may exist on materials used in this Software Services have been adhered to.

**6.2 Security Warranties.** BidSync shall not use and shall not allow anyone else under its control to use Confidential Information collected by BidSync for any purpose or to provide it to any third party unless: (i) the Software Services Authorized User is given clear prior notice of the possibility of such other use; (ii) the Software Services Authorized User affirmatively consents to such use; or (iii) Customer agrees to such other use. BidSync shall maintain the security of Confidential Information in its custody and the integrity of transactions received through its interfaces and through the Software Services. Redundant levels of security will be deployed as necessary throughout the Software Services. Except for Customer's perpetual license to vendor information granted to BidSync under Section 3.12, BidSync shall not use any Confidential Information in its custody for its own purposes or the purposes of its other clients unless Customer expressly agrees to the use of that specific information.

**6.3 Customer Warranties.** In addition to any other express warranties herein, Customer represents, warrants, and covenants to BidSync that any and all Customer Data uploaded to the Site or used with the Software Services shall not infringe or violate the Intellectual Property Rights of any third party. Customer shall indemnify and hold BidSync and its officers, agents, and employees harmless from all claims, losses, damages, causes of action and liability of every kind including expenses of litigation, court costs, and attorneys fees related to Customer's use of Customer Data with the Software Services.

**6.4 Disclaimer.** EXCEPT FOR THE EXPRESS WARRANTIES STATED ABOVE, THE SOFTWARE SERVICES ARE PROVIDED "AS-IS" AND CUSTOMER ACCEPTS THE ENTIRE RISK AS TO THE QUALITY, PERFORMANCE AND RESULTS OF USE OF THE SOFTWARE SERVICES. EXCEPT AS OTHERWISE RESTRICTED BY LAW, BIDSYNC DISCLAIMS ALL OTHER REPRESENTATIONS, WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, BY STATUTE OR OTHERWISE, REGARDING THE SOFTWARE SERVICES, INCLUDING, BUT NOT LIMITED TO, ITS FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, QUALITY, TITLE, OR ITS NON-INFRINGEMENT. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY BIDSYNC OR ITS RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, DISTRIBUTORS OR AGENTS WILL INCREASE THE SCOPE OF THE EXPRESS WARRANTIES STATED ABOVE, OR CREATE ANY NEW REPRESENTATIONS, WARRANTIES OR CONDITIONS.

## SECTION 7 INDEMNIFICATION

**7.1 Infringement.** BidSync, at its own expense, will defend any action brought against Customer based on a claim by any third party that the Software Services, as used within the scope of this Agreement or applicable Order, infringe or misappropriate any Intellectual Property Right(s) of such third party enforceable in the United States, and BidSync shall hold Customer harmless from any liability for any costs and damages ordered by a court as a result of such action or resulting from a monetary settlement thereof, provided Customer notifies BidSync promptly in writing of the action (and all prior claims relating to such action), BidSync has sole control of the defense and all negotiations for settlement or compromise of the action, and Customer reasonably cooperates with BidSync in such defense (including, without limitation, making available to BidSync all relevant documents and other information in Customer's possession and by making Customer's personnel available to testify or to consult with BidSync or its attorneys).



**7.2 Exclusions.** BidSync shall have no liability or obligation with respect to any infringement or misappropriation claim based upon: (i) any use of the Software Services not in accordance to this Agreement, the applicable Order, or the Documentation; (ii) any use of the Software Services in combination with other products, equipment, software or data not supplied by BidSync, referenced in the Documentation, or otherwise authorized by BidSync; or (iii) any modification of the Software Services made by any person other than BidSync where such modification is not authorized by BidSync.

**7.3 Remedies.** If the Software Services or any portion thereof become or, in BidSync's sole discretion, are likely to become the subject of an infringement or misappropriation claim, BidSync may, at its sole option and expense, either: (a) procure for Customer the right to continue to use the Software Services pursuant to this Agreement and the applicable Order; (b) replace or modify the Software Services to make them non-infringing; or (c) terminate this Agreement or the applicable Order and Customer's right to use the Software Services, and refund to Customer any unused pre-paid fees for the terminated Software Services as of the date of termination.

SECTIONS 7.1, 7.2 AND 7.3 STATE BIDSINC'S ENTIRE LIABILITY AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR INFRINGEMENT AND MISAPPROPRIATION CLAIMS AND ACTIONS BASED ON ANY SERVICES OR PRODUCTS PROVIDED BY BIDSINC.

**7.4 By Customer.** Customer agrees to defend, indemnify and hold BidSync, its Affiliates, officers, directors and employees harmless from any claim, demand, damages, costs and expenses (including reasonable attorneys' fees), arising from any third party claim against BidSync solely due to or arising out of: (i) any use of the Software Services by Customer other than in accordance with this Agreement; (ii) any unauthorized modification of the Software Services by Customer, including any claims for Intellectual Property infringement arising therefrom; or (iii) in the event that Customer requires BidSync to collect Social Security Numbers or other sensitive information, any liability to BidSync as a result of its use of such information in furtherance of its provision of services to Customer.

## **SECTION 8 LIMITATION OF LIABILITY**

**8. LIMITATION OF LIABILITY.** UNLESS FURTHER LIMITED ELSEWHERE IN THIS AGREEMENT, BIDSINC'S AND ITS DIRECT AND INDIRECT SUPPLIERS' AGGREGATE LIABILITY FOR DAMAGES FOR ANY CAUSE RELATED TO OR ARISING OUT OF THIS AGREEMENT, WHETHER IN CONTRACT, NEGLIGENCE OR TORT, WILL NOT EXCEED THE GREATER OF (A) TEN THOUSAND U.S. DOLLARS (US \$10,000) OR (B) THE TOTAL FEES AND CHARGES PAID BY CUSTOMER TO BIDSINC FOR THE SERVICES GIVING RISE TO THE LIABILITY DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRIOR TO THE DATE CUSTOMER'S CAUSE OF ACTION ACCRUED. IN NO EVENT SHALL BIDSINC OR ITS DIRECT OR INDIRECT SUPPLIERS OR AFFILIATES BE LIABLE FOR (A) ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, EVEN IF BIDSINC HAS BEEN ADVISED OF THE POSSIBILITY THEREOF INCLUDING BUT NOT LIMITED TO LOSS OF DATA OR INFORMATION OF ANY KIND, LOST PROFITS, LOST BUSINESS REVENUE OR FAILURE TO REALIZE EXPECTED SAVINGS AND REGARDLESS OF WHETHER ANY CLAIM FOR SUCH RECOVERY IS BASED UPON THEORIES OF CONTRACT, NEGLIGENCE OR TORT (INCLUDING STRICT LIABILITY), OR (B) ANY CLAIM AGAINST CUSTOMER BY ANY OTHER PERSON. NOTWITHSTANDING THE FOREGOING, THIS SECTION 8 SHALL NOT LIMIT, NOR SHALL BE CONSTRUED OR APPLIED TO LIMIT: (I) THE INDEMNIFICATION OBLIGATIONS OF EITHER PARTY SET FORTH IN SECTION 7, OR (II) THE LIABILITY OF EITHER PARTY FOR DIRECT MONEY DAMAGES RESULTING FROM A BREACH OF THE OBLIGATIONS OF NONDISCLOSURE AND CONFIDENTIALITY IMPOSED BY SECTION 9 HEREOF.

## **SECTION 9 CONFIDENTIALITY**

**9. Confidentiality.** Both parties hereby agree that "**Confidential Information**" means any and all technical and non-technical information, including trade secrets, know-how and proprietary information, firmware, designs, schematics, techniques, source code, plans or any other information relating to any product or service as well as work in process, future development, scientific, engineering, manufacturing, marketing or business plans, or financial or personnel matters relating to either party or its present or future products, sales, suppliers, customers,

employees, investors or Affiliates disclosed or otherwise supplied in confidence by either party to the other party, acquired in the course of carrying out the tasks hereunder or as a result of access to the premises of a party (including in the context of a request for information or request for proposal, or related to discussions between the parties in anticipation of potential Orders). Confidential Information also includes: (i) information disclosed in a written or other tangible form which is clearly marked with a “confidential” or “proprietary” legend or other comparable legend; (ii) information disclosed orally or visually which is identified as confidential at the time of disclosure and confirmed in writing within a reasonable time; (iii) any other information which a reasonable person would deem confidential under the context of disclosure or due to the nature of the information; (iv) in the case of BidSync, any software used to deliver the Software Services and all modifications, enhancements, updates, and derivatives thereof, as well as the Documentation, functional specifications, methods, concepts, designs, and all other similar information regarding the Software Services or other services; and (v) in the case of Customer, the Customer Data. Both parties (in such capacity, the “**Recipient**”) hereby agree to maintain as confidential all material, non-public Confidential Information, which it learns about the other party (the “**Disclosing Party**”) as a result of its respective performance under this Agreement and, except as may be required by applicable law or regulation, to refrain from disclosing any Confidential Information to any third party and to disclose such Confidential Information only to those agents, employees and representatives of the Recipient who need to know that which is disclosed to them. Confidential Information shall not include: (A) information in the public domain or which enters the public domain after the Effective Date without any breach by the Recipient of its obligations hereunder; (B) information which is disclosed to the Recipient after the Effective Date by a third party whose disclosure of information is unrelated to this transaction or who is unrelated to the Disclosing Party and who is not violating any obligation to the Disclosing Party by disclosing such information; or (C) information which is hereafter developed by the Recipient independent of any Confidential Information. Upon expiration or termination of this Agreement for any reason, each party shall promptly return to the other party, or destroy, as the parties agree, all copies of the other party’s Confidential Information. All copies, notes or other derivative material relating to the Confidential Information shall be promptly retrieved or destroyed, as agreed, and no such material shall be retained or used by the receiving party in any form for any reason. Notwithstanding the foregoing, vendor contact and demographic information provided by Customer, whether or not in combination with Customer Data, shall not be deemed Confidential Information and BidSync shall be granted a perpetual license thereto pursuant to Section 3.12.

## **SECTION 10 MISCELLANEOUS PROVISIONS**

**10.1 Compliance with the Law.** Both parties shall at all times observe and comply with all Federal, State and local laws, ordinances and regulations including all amendments and revisions thereto, which in any manner affect this Agreement or the Software Services, and **shall indemnify, save and hold the other party harmless against any claim related to or arising from the intentional violation of any such laws, ordinances and regulations.**

**10.2 Assignment and Subletting.** BidSync agrees to retain control and to give full attention to the fulfillment of this Agreement, and that this Agreement shall not be assigned or sublet without the prior written consent of Customer. BidSync further agrees that the subletting of any portion or feature of the services provided hereunder, or materials required in the performance of this Agreement, shall not relieve BidSync from its full obligations to Customer as provided by this Agreement. The terms, provisions, covenants, obligations and conditions of this Agreement are binding upon and inure to the benefit of the successors in interest and the assigns of the parties to this Agreement if the assignment or transfer is made in compliance with the provisions of this Agreement.

**10.3 Use of Contractors.** Notwithstanding anything contained in this Agreement to the contrary, BidSync may utilize the services of independent service providers/contractors who may provide the Software Services to Customer on BidSync’s behalf. Notwithstanding the foregoing, no subcontracting shall relieve BidSync of its obligations and liability hereunder for the provision of Software Services described herein.

**10.4 Independent Contractor.** BidSync covenants and agrees that BidSync is an independent contractor and not an officer, agent, servant or employee of Customer; that BidSync shall have exclusive control of and exclusive right to control the details of the services performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between Customer and BidSync, its officers, agents, employees, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between Customer and BidSync.

**10.5 Force Majeure.** In the event that a party is materially unable to perform any of its obligations hereunder because of strike, natural disasters, Acts of God, riots, wars, governmental action, or other event of force majeure beyond such party's control, then such party shall, upon notice to the other party thereof, be relieved from its performance of such obligations to the extent, and for the duration, that such performance is prevented by such events; provided that such party at all times uses all reasonable efforts to resume such performance.

**10.6 Modification and Waiver.** No modification of this Agreement or an Order, and no waiver of any breach of this Agreement or an Order will be effective unless in writing and signed by an authorized representative of the party against whom enforcement is sought. No waiver of any breach of this Agreement or an Order and no course of dealing between the parties will be construed as a waiver of any subsequent breach of this Agreement or Order.

**10.7 Severability.** The provisions of this Agreement and the applicable Order are severable. If any provision of such is held to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions will in no way be affected or impaired thereby.

**10.8 Interpretation.** Each party acknowledges that this Agreement has been the subject of active and complete negotiations, and that this Agreement should not be interpreted or construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this Agreement. Section headings are provided for convenience only and are not to be used to construe or interpret this Agreement. Whenever the words "include" or "including" are used in this Agreement, they will be deemed to be followed by the words "without limitation."

**10.9 Governing Law.** This Agreement is governed by the laws of the United States of America and The State of Utah. Venue for any dispute arising out of this Agreement will lie in the state or federal courts of Salt Lake City, Utah.

**10.10 BidSync Employees.** Customer hereby agrees that, during the Term of this Agreement, Customer shall not employ nor tender any offer of employment to any employee of BidSync without first obtaining BidSync's prior written consent, which may be withheld for any reason. For the purposes of this Section only, the term "employee" extends to all present and future employees of BidSync during the period of their employment and continues for a period of six (6) months after any such employee leaves the employ of BidSync; provided however, that this Section shall not apply in the event BidSync should cease conducting all business operations.

**10.11 Notice.** Any notice required or permitted to be given under this Agreement by one party to the other shall be in writing. Notice under this Agreement shall be accomplished by transmitting the documents (1) via facsimile as well as (2) by overnight delivery service or overnight U.S. mail with, and effective upon, written confirmation of the latter. The address of BidSync for all purposes under this Agreement and for all notices hereunder shall be:

BidSync  
ATTN: Chief Executive Officer  
629 East Quality Drive, Suite 101  
American Fork, UT 84003  
Facsimile: 801-765-9246

The address of Customer shall be specified on the Order. Each party may change the address for notice to it by giving notice of the change in compliance with this Section. Customer shall provide BidSync with contact information for each vendor that is provided access to the Software Services.

**10.12 Non-Waiver of Default.** No payment, act or omission by either party may constitute or be construed as a waiver of any breach or default of the other party which then exists or may subsequently exist. The failure of either party to exercise any right or privilege granted in this Agreement shall not be construed as a waiver of that right or privilege. All rights of either party under this Agreement are specifically reserved and any payment, act or omission shall not impair or prejudice any remedy or right of either party under it. Any right or remedy stated in this Agreement shall not preclude the exercise of any other right or remedy under this Agreement, the law or at equity, nor shall any action taken in the exercise of any right or remedy be deemed a waiver of any other rights or remedies.

**10.13 Counterparts.** Original signatures transmitted and received via facsimile or other electronic transmission of a scanned document, (e.g., PDF or similar format) are true and valid signatures for all purposes hereunder and shall bind the parties to the same extent as that of an original signature. Any such facsimile or electronic mail transmission shall constitute the final agreement of the parties and conclusive proof of such agreement. This Agreement may be executed in one or more counterparts, each of which shall for all purposes be deemed to be an original and all of which shall constitute the same instrument.

**10.14 Export Controls.** Customer understands and acknowledges that BidSync may be subject to laws and regulations which prohibit export or diversion of certain software and technology to certain countries (“**Export Laws**”). Any and all obligations of BidSync to provide the Software Services, as well as any other technical information or assistance shall be subject to the Export Laws as shall from time to time govern the license and delivery of technology and software. Customer warrants that it will comply with the Export Laws in effect from time to time as they relate to all aspects of this Agreement and its implementation.

**10.15 Intergovernmental Cooperative Purchasing Agreements/Piggyback Rights.** Upon full execution of a subcontract document, entities can piggyback or adopt BidSync for any of their day-to-day bids, quotes, and proposals, auctions, etc. under this contract. Intergovernmental Cooperative Purchasing agencies and or any government agency can piggyback these Contract terms and conditions and will negotiate separate agency payment terms with BidSync contractually separate and outside this contract.

**10.16 Entire Agreement.** These Terms & Conditions, Attachment A – Order Form, and Attachment B – Scope of Available Product, Services and Support set forth the entire agreement and understanding of the parties with respect to the transactions contemplated hereby and supersedes all prior agreements, arrangements, and understandings relating to the subject matter hereof.

## **ATTACHMENT A**

### **SCOPE OF AVAILABLE PRODUCT, SERVICES AND SUPPORT**

#### **I. Description of the Software Services**

##### **BidSync eProcure™ Core System**



The BidSync eProcure™ Core System provides the ability to electronically create, manage, and award all standard solicitation and quotation types, in addition to paper solicitations. It automatically notifies suppliers (preferred and/or system suggested) and securely facilitates the receipt and electronic tabulation of responses. It then allows for the award to be made and suppliers notified.

In addition to the solicitation creation functionality, the BidSync eProcure™ Core System allows for common solicitation management functionality including pre and post-bidding periods, a substantial vendor management database, temporary and secure work areas, user-defined and configurable workflows, question and answer sections with addendum upload and download tools, online pre-bid conference hosting and many other features which greatly enhance the efficiency and productivity of the bid process. In addition, the solution provides a document management capability where large files can be easily accessed and downloaded by users, as well as the ability to create electronic award scenarios to better allow customers to define and evaluate system-supported bid awards. It also contains a robust suite of reporting tools, including standard reports and ad-hoc reporting, which allow users to export reports in various file formats. The system uses the National Institute of Government Purchasing (NIGP) Commodity Classification Codes which are updated regularly. In addition, eProcure offers a complete Vendor Management solution that offers the ability to closely manage vendor relationships and potential qualifications/certifications. It includes the ability to use an existing unique identification system (ex: tax ID, FEIN) with our system-generated identifier to securely lock in the identity of a supplier, while processing each account through multiple checkpoints for matching and de-duplication, which allows for vendor information to be current and applicable. Furthermore, the Vendor Management functionality enables the ability to communicate dynamically and directly with suppliers via email, fax and/or phone for issues unrelated to the bid process such as conference invitation and surveys. This also allows for vendor diversity (DVBE, SB, WBE, HUB, etc) and Environmentally Preferred Purchasing goals to be tracked and reported. Vendors are able to register and manage their accounts online – in order to ensure that all their contact information is kept current and accurate. Vendors have the option to receive certain notifications via email, facsimile, or SMS text.

For information on specific functionality, please refer to the product documentation.

##### **BidSync eProcure™ Modules**

All modules have been specifically designed to fit seamlessly into the BidSync eProcure™ Core System and work natively with other modules creating an overall user friendly system. eProcure Modules cannot be purchased without the BidSync eProcure™ Core System.

##### ***Contract Management Module***

The Contract Management Module allows for the mass system-supported import, display and search of legacy, existing and new contracts. Contracts can be shared and used across agencies as allowed. Associated workflows allow for configuration of public and private access, unique numbering, and automated expiration and renewal reporting. Contract mirroring capabilities allow for the quick creation of new contracts. A variety of general and ad-hoc reporting is also included with the Contract Management Module.

### ***RFP Evaluator Module***

The RFP Evaluator Module is an advanced web-based RFP scoring tool which allows invited committee members to quickly and easily log into a secure scoring/evaluation system to streamline the scoring process. The tool automatically notifies committee members of tasks, allows for a user-configurable workflow to control the process, and then electronically tabulates the scores into customizable reports. All evaluation criterion and scoring parameters are defined by the customer.

### ***Cooperative Bidding Module***

The Cooperative Bidding Module allows for the creation and management of cooperative and sponsored bids and contracts from multiple users within or outside of a single entity. This includes configurable workflows for creation, display, approval, notification, and award. Participating cooperative users can also suggest additional items to be considered for cooperative bids.

### ***Pre-Award Situational Options Module***

BidSync eProcure™ is also designed to better accommodate the need for when customers are faced with multiple situational options that feed into the final award decision. Users with the appropriate permissions can create multiple award situations, based on customer-defined parameters. Each situational option is created and stored on the system and can easily be loaded as the final award decision. In addition to exportable formats of the defined options, the Pre-Award Situational Options Module can also be used in conjunction with BidSync's RFP Evaluator Module.

## **II. Description of Maintenance and Support Services**

**System Maintenance and Support Services.** BidSync shall ensure that only properly trained BidSync technicians or other qualified personnel perform the System Support Services as defined below. The System Support Services shall be sufficient to enable the Software Services to perform in accordance with this Scope of Software Services and all representations, warranties and specifications provided to the customer by BidSync in connection with this Agreement and any amendments or addenda thereto that may be issued from time to time. BidSync shall provide the customer with the Software Services support services set forth below (the "**System Support Services**") as part of the fees provided for under this Agreement:

- **Telephone Support.** BidSync technicians shall provide telephone support by means of a toll-free support line, which the customer may use during business hours (6:00 a.m. - 6:00 p.m., Mountain Time, Monday through Friday; excluding nationally recognized holidays). Telephone support shall include without limitation (i) answering questions concerning use of the Software Services; and (ii) providing technical support.
- **Web Access.** BidSync shall provide additional technical assistance in the form of access to BidSync's website and online bulletins, all of which shall be maintained by BidSync and available to the customer 24 hours/day, 7 days/week, and 365 days/year excluding scheduled downtime for maintenance.
- **Problem Resolution Criteria and Timelines.** When the customer reports program errors or malfunctions in the Software Services, or when the Software Services do not conform substantially to the Performance and Availability levels specified below, BidSync shall correct the identified errors or modify the Software Services to conform to the specifications according to the impact level criteria set forth below.
  - **Critical Impact.** If a Software Services problem resulting from program errors or malfunctions has a critical business impact, defined as a complete loss of use of the Software Services such that personnel cannot reasonably continue to work, BidSync shall respond within fifteen (15) minutes, and shall provide a temporary solution through a workaround within one (1) hour and continue such efforts until the problem is fixed, patched or a suitable workaround is provided or until the problem has been reduced to a lower impact level.
  - **Significant Business Impact.** If a Software Services problem resulting from program errors or malfunctions has a significant business impact, defined as a significant loss of use of the Software Services or degradation of such use, BidSync shall respond within thirty (30) minutes, and shall

provide a temporary solution through a workaround within four (4) hours and shall continue such efforts until the problem is fixed, patched or a suitable workaround is provided or until the problem has been reduced to a lower impact level.

- **Minimal Business Impact.** If a Software Services problem resulting from program errors or malfunctions has a minimal business impact, defined as the customer's ability to continue work with only minor impediments or loss of use of the Software Services, BidSync shall respond within four (4) hours and shall provide a permanent correction in its next release of a Software Services upgrade or enhancement.

As part of the System Support Services, BidSync shall provide online training on Software Services access, use and operations to the customer's personnel (the "Training") up to two times each year per customer. The customer's access to BidSync's database of online video demonstrations is unlimited.

### **III. Description of the Software Services Availability**

**Software Services Availability.** BidSync will use commercially reasonable efforts to provide the Software Services and make them available 24 hours per day, 7 days per week, 99.8% of the time each month, excluding any Scheduled Downtime, as defined below. Notwithstanding the foregoing, the availability of the Site and the Software Services are provided by BidSync on an "AS IS" basis to Customer.

In the event that the solution is unavailable then BidSync will credit Customer 5% of the monthly subscription fee (calculated as 1/12<sup>th</sup> of annual fee) for each 1-hour increment of downtime. Credit is only calculable in full hours. For example, 57 minutes of downtime is not creditable; 1-hour of downtime will result in a 5% credit; and 3 hours and 22 minutes of downtime will result in a 15% credit (3 hours x 5%). Total monthly credit amount will not exceed monthly subscription fee (calculated as 1/12<sup>th</sup> of annual fee). Scheduled downtime will not be considered for credits.

- **Scheduled Downtime.** Scheduled and planned Software Services outages are for the purpose of providing system updates and scheduled releases for the System Support Services. All outages are scheduled with a minimum of 72 hours advance notice to the customer and shall occur only during non-peak hours unless otherwise agreed by the parties.

### **IV. Implementation**

- **Basic implementation** includes: 1) a one-time import of an unlimited number of suppliers, 2) online document import for up to twenty discrete documents, 3) basic user configuration and standard workflows, and 4) web and phone based training. Basic Implementation is designed to get the average customer fully implemented within four weeks.
- **Advanced implementation** includes integration and additional configuration as necessary.

The BidSync products are meant to be configurable in most cases. In some cases, customizations may be required by our customers. The most common of these is a two-way bridge to a financial or ERP system. Any customization will be priced individually as "Additional Services" defined below.

### **V. Training**

**Basic training** includes training for users and administrators conducted over the phone or via BidSync's database of online demonstration videos. Basic training is included with the purchase of the BidSync eProcure™ Core System, the BidSync Builder™ Core System, or BidSync ProcurePointe™ for up to two phone trainings per year and unlimited access to BidSync's database of online video demonstrations.

**Advanced training** includes on-site training or support and is priced on a custom basis.

### **VI. Security and Privacy**

The Software Services utilizes the latest, cutting edge security and privacy tools including SSL 256-bit encryption, server certificates with Global ID provided by a premier national provider, the highest level of encryption dictated by Federal guidelines – the AES algorithm and SAS 70 Type II certification. Our data is stored in mirrored, redundant, highly secured facilities. BidSync’s privacy policy is available at [www.bidsync.com/privacy](http://www.bidsync.com/privacy).

## **VII. Upgrades and Enhancements**

BidSync will provide upgrades and enhancements to the Software Services, as defined herein. BidSync may, at its sole discretion, charge the customer a reasonable fee for "upgrades" and "custom enhancements".

For purposes of this Agreement, the terms “upgrades” and “custom enhancements” shall include without limitation any and all releases that have the following functions and purposes: (i) implementing correction of Software Services (or component application) errors or malfunctions; (ii) adding new Software Services features, functions and performance capabilities, including modifications designed to meet federal, state and legally mandated requirements; and (iii) changing the intellectual property contained in the programs.

## **VIII. Additional Services**

BidSync shall perform any additional services set forth in the Order (the “**Additional Services**”) according to BidSync’s then current hourly rates. Additional Services shall be described in the Order and may include, without limitation, custom development services, consulting services, and other services. Upon BidSync’s receipt of a written request from the customer for any Additional Services, and acceptance of such request by BidSync, BidSync shall provide a written quotation, at no cost to the customer, of the type of Additional Service requested, the cost of the Additional Services, and the time required to complete the same. Upon receiving the customer’s written approval to proceed with the Additional Services, BidSync shall perform the Additional Services at a time mutually agreed upon by BidSync and the customer.

## **IX. Communication System Only Disclaimer**

Although the Software Services are sometimes called an online auction system, it does not perform the function of a traditional auctioneer. The customer acknowledges that BidSync’s website merely provides the communication system and means to allow the customer to perform the solicitation and procurement services described in this Agreement. BidSync is not involved in the actual transaction between vendors and buyers. As a result, BidSync does not verify or have any control over the quality, safety or legality of the items sought or offered, the identity of each vendor, the truth or accuracy of bid information submitted by vendors, quotations, or statements made, or the ability of vendor to sell or deliver products or services. BidSync advises the customer to use caution, common sense, and practice safe trading when using the Software Services. BidSync does not ensure that a vendor will actually complete a transaction.



**ATTACHMENT B  
ORDER FORM**

**NOW, THEREFORE**, for and in consideration of the covenants and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, and for the mutual benefits to be obtained hereby, Customer agrees to pay for and BidSync agrees to provide the following:

<u>Core Systems Ordered</u>	<u># of Users</u>	<u>Max # of Bids/year</u>	<u>Modules Ordered</u> A-RFP Evaluator B-Cooperative Bidding C-Pre-Award Situational Options D-Planholder's List E-Award Scenario Creation F-Reprographic File Transfers	<u>Training Type- Basic or Advanced</u>	<u>Implementation Type-Basic or Advanced</u>	<u>Annual Cost during Initial Term</u>
<b>BidSync eProcure</b> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Unlimited		NA	Basic	Basic	\$8,500.00
<b>Description of Additional Services:</b> Implementation Services (Basic)						\$2,550.00
<b>Total Annual Cost for Initial Term</b>						\$11,050.00

**Initial Term:** 3 years

**Renewal Term:** Two (2) one (1) year options

**Pricing after Initial Term:** After the Initial Term, BidSync may increase the annual cost by not more than 10% per year.

**Payment Terms:** BidSync will invoice Customer electronically via the eProcure Core System. The Initial Term will be billed annually. All invoices will be due Net 30 days from issuance.

IN WITNESS WHEREOF, Customer and BidSync have duly executed this Agreement effective as of the later of the Effective Date or the date set forth below.

**BidSync**

**City of Manhattan Beach, CA**

*Patricia Stutz*

By: \_\_\_\_\_

Patricia Stutz

Name: (Print) \_\_\_\_\_

VP, Operations

Title: \_\_\_\_\_

June 3, 2015

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: (Print) \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

*Quinn M. Barrow*  
\_\_\_\_\_  
Quinn M. Barrow, City Attorney